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JUDICIAL ADMINISTRATION.¹

Nothing is clearer today than the need of attention to administration in all its aspects. The value of any legal conception may be measured by its contact with the realities of life; except as it does service to men it is sterile and profitless. What is the most perfect system of substantive law without a procedure by which its rights and duties are made something more than abstractions? The Constitution of the United States almost pales beside the fundamental law of Mexico in its solicitude for life, liberty, and property, and its insistence on the freedom of the legislative and judiciary from executive encroachment;² yet the requirement that "no one shall exercise violence to enforce

¹ An address delivered before the Law Association of Philadelphia, January 25, 1915.

² Art. 2. In the Republic all are born free. Slaves who set foot upon the national territory shall recover, by that act alone, their liberty, and shall have a right to the protection of the laws.

Art. 4. Everyone shall be free to engage in any honorable and useful profession, industrial pursuit, or occupation suitable to him, and to avail himself of its products.

Art. 5. No one shall be obliged to perform personal work without just compensation and without his full consent (unless the work be imposed as a penalty by the judicial authority).

Art. 6. The expression of ideas shall not be the object of any judicial or administrative investigation, except in case it attacks morality, the rights of a third party, provokes some crime or misdemeanor, or disturbs public order.

Art. 9. No one shall be deprived of the right peacefully to associate or unite with others for any lawful purpose but only citizens of the Republic

his rights" is not self-executing.³ And even this side the Rio Grande our attention is insistently called to defects in the administration of justice which make some of *our* rights things of legal theory rather than living realities. Such complaints are not to be neglected. They call for a re-examination of settled habits—for an effort to face the facts of life, and appraise things at their real worth—for applying the test of common sense to methods made familiar by long use. The community is in no temper to tolerate practices which have no justification except that they have been followed in the past; and we lawyers are not immune from the danger of accepting words, preferably pompous words in a foreign language, as convenient substitutes for ideas, or following a beaten track because doing as we have seen others do is easier than thinking. One of the great needs of the present time is simplifying and unifying; for in the outpour of decisions from many courts and in the vast complexity of life we are likely to

may assemble in order to take part in the political affairs of the country. No armed assembly shall have the right to deliberate.

Art. 13. In the Mexican Republic no one shall be judged by special laws or by special tribunals. Martial law may exist only for crimes and offenses which have a definite connection with military discipline. *The law shall determine with absolute clearness the cases included in this exception.*

Art. 14. No retroactive law shall be enacted. No one shall be judged or sentenced but by virtue of laws made prior to the act, and exactly applicable to it, and by a tribunal which shall have been previously established by law.

Art. 17. No one shall be arrested for debts of a purely civil character. *No one shall exercise violence in order to enforce his rights.* The tribunals shall always be prompt to administer justice, which shall be gratuitous, judicial costs being consequently abolished.

Art. 27. Private property shall not be taken without the consent of the owner, except for a public purpose, and upon previous indemnification. The law shall determine the authority which may make the condemnation and the conditions upon which it may be carried out.

Art. 28. There shall be no monopolies, nor exclusive privileges of any kind nor prohibitions under the guise of protection to industry. The only exceptions to this shall be those relative to the coining of money, to the mails, and to the privileges which, for a limited time, the law may grant to inventors or to the perfectors of some improvements.

Art. 50. The supreme power of the Federation shall be divided for its exercise into legislative, executive, and judicial. Two or more of these powers shall never be united in one person or corporation, nor shall the legislative power be vested in one individual.

Art. 85. The powers and duties of the President shall be the following:
I. To promulgate and execute the laws passed by the Congress of the Union, providing, within the executive sphere, for their exact observance.

XIII. To give the judicial power the assistance which may be necessary for the prompt exercise of its functions.

³"A legal proposition without legal compulsion behind it is a contra-

be lost unless we can lay hold on what is broad and significant and fundamental.

A year or so ago the Supreme Court of the United States by the vote of a single judge held⁴ that the Constitution of the United States forbade the application to a trial in the Federal Courts of a Pennsylvania statute permitting the entry of judgment for a defendant, when the trial court ought to have directed that very judgment but had erroneously refused to do so. A verdict should confessedly have been ordered at the trial as a matter of law; nevertheless according to the decision the higher court could not, without violating the constitutional right of trial by jury, do the very thing the trial judge should have done. The reasoning of the majority is a tempting subject for discussion; and when such doctors disagree in terms of five to four it is no presumption for humbler legal folk to have an opinion. In my own State some of us who think well of trial by jury are content that our court has found it possible to escape the conclusions of the *Slocum* case;⁵ and I conjecture a similar satisfaction among the Pennsylvania bar in the concurrence of your eminent court with the views of Mr. Justice Hughes and his associates in dissent. But I shall not take a feeble flail to straw so well threshed; indeed a discussion of the *Slocum* case on its merits would be beside my purpose. I wish only to consider the decision in terms of its actual purport and effect, and the theory of a trial which underlies it.

The decision makes the right to a jury trial not merely the right to go to a jury on a material issue of litigated fact—that right the statute recognizes—but the right to do this twice if the litigant fails to prove his case the first time. He tried his case once, presenting the best he had; or if he did not, it was nobody's

diction in itself; a fire that burns not, a light that shines not." Ihering, *Zweck im Recht* (3rd ed.) I, 322.

"Covenants without the sword are but words and of no strength to secure a man at all." Hobbes (*Molesworth* ed.), III, 154.

Cf. *Kinglake, Crimea*, vol. 1, chap. 14.

I am indebted for these citations to Mr. Hershey's valuable paper "Covenants without the Sword", *Maryland State Bar Association Reports* (1909), 141.

⁴ *Slocum v. New York Life Insurance Co.*, 228 U. S. 364 (1913).

⁵ *Bothwell v. Boston Elevated Railway Co.*, 215 Mass. 467 (1913).

fault but his own. He thought it was a good case in point of law, and the trial judge made the mistake of agreeing with him. Now that their mistake has been revealed the Constitution guarantees him the opportunity (or shall we say the temptation) of discovering a new case—an opportunity the value of which is uncomfortably likely to depend, among other things, on his moral fibre. It is not merely “the right of trial by jury”, but the right of *two trials by jury*, which is “preserved” by the Seventh Amendment.

This theory of a right to two trials, enshrined in the Constitution, involves consequences so surprising as to suggest some fundamental misconception of trial by jury, either on the part of the framers or the interpreters of the Seventh Amendment. And there is much in American practice to indicate such a misconception.

Jury trial, in many parts at least of this country, little resembles what our ancestors brought with them from England. Englishmen, with their genius for adapting old institutions to the needs of popular government,⁶ have developed through the centuries a mode of trial by which the sense and experience of a body of plain men, helped and directed by a trained magistrate, are used to solve disputed problems of fact. Such a trial was always a trial by *judge and jury*; control and guidance by the court was one of its essential features; it was never supposed that

* “When one scrutinizes the English Constitution, it is like looking at the nests of birds or at the curious and intricate work of beavers and insects; its strange contrivances seem not so much the ordered and foreseen result of human wisdom as a marvellous outcome of instinct, of a singular political sense and apprehension, feeling its sure way for centuries, amid all sorts of obstacles, through and around and over them, with the busy persistence of a tribe of ants. England, in emerging from the Middle Ages, has brought along its old forms and institutions—king and lords and all the phraseology of feudal subjection—but it has harnessed all these stately mediaeval appearances into the service of freedom. Through the extraordinary energy of the English political genius, the old institutions have grown elastic and significant of new thought. ‘I, the writer,’ says the author of *Ottimo Commento*, ‘heard Dante say that never a rhyme had led him to say other than he would, but that many a time and oft he had made words say in his rhymes what they were not wont to express for other poets.’ In like manner the English have forced their familiar institutions to express their highest political conceptions. Never an institution has led them to say other than they would; and, indeed, they have said through these institutions things that other nations have not known how to express.” Thayer, *Legal Essays*, 191-2.

an untrained tribunal, or opposing advocates, could be looked to for effective administration. It is a far cry from such a proceeding to a contest conducted under rules which treat the judge with suspicion, if not with contempt, and permit two forensic gladiators to dominate the scene.⁷ Precautions are taken to prevent his mitigating the effects of their oratory; and except for ruling on questions of law he sits silent until something like a breach of the peace is threatened. Even in that event his first care must be to do nothing prejudicial to anybody. His two duties, in other words, are inactivity and ruling on law points. Both of these he practices extensively. He is confronted at any moment and in any quantity with legal problems of all degrees of difficulty, raising all sort of points. He must rule on these with no proper chance for study, and largely at the mercy of the unequal learning and plausibility of opposing counsel, each seeking in the heat of trial to help his case rather than the court. To each of these rulings, in making which he labors under such disadvantages, an exception may be taken. The penalty for any error is the panacea of a new trial—a penalty not only too heavy, but one which, by delaying justice and increasing its expense, is largely visited on the wrong persons. This mass of new trials, too, is swollen by those in which the verdict, rendered without the help which under the English system the jury would have received before it was rendered, is set aside as against the weight of evidence. As has been well said by Professor Sunderland,⁸ the judge is forced to “sit mute, allow the verdict to be rendered

⁷“Our law of procedure distrusts the judge profoundly.” Professor Pound in 4 *ILL. LAW REV.* 398 (1910). “Anciently and until lately, the judge, holding his court, was the principal personage. He was clothed with the insignia of dignity, and represented majesty—the majesty of the law. It is so now to some, but not to the same, extent.” Reade, J., in *State v. Miller*, 75 N. C. 73 (1876), enforcing a statute which forbids the court to limit the time of *any* attorney in argument. See also the remarks of Mr. Justice Brown of the Supreme Court of the United States in his address on “Judicial Independence”, discussing statutes providing that if a judge refuses to sign a bill of exceptions, “it shall be lawful for any two attorneys who may be present at the time to sign such bill of exceptions, which shall have the same force and effect as if signed by the judge”, forbidding judges to require counsel to stand during the examination of witnesses, and other like enactments. 12 *Rep. Am. Bar Ass.* 273-284 (1889).

⁸The Inefficiency of the American Jury, 12 *MICH. LAW REV.* 302, 314, 315 (1915).

without a word of warning, and then destroy it," so that while the jury are "flattered to their faces by being told" that they are the exclusive judges of the facts, this fiction is promptly "repudiated behind their backs." In such ways we have suffered a pest of new trials to grow up in this country which is as great a reproach to our judicial administration as is the curse of typhoid fever to our care for the public health.

For some States this picture is overdrawn; in others it falls short of the truth. Such absurdities as forbidding the court to instruct the jury in any form except by affirming written requests of counsel,⁹ or putting the charge before counsels' closing arguments,¹⁰ make contrasts with the real trial by jury more glaring and grotesque than many of the Continental imitations which look so strange to us. Even the best American practice exposes itself to such criticism far more than it should. We have become used to our local ways and we accept them; in a measure we make the best of them, as any healthy organism adapts itself to a wound. But although it grows on, the scar remains, and it may require the perspective of a detached vision to realize how serious are the consequences. The delays and failures in the administration of justice of which we hear so much today may be due in no small part to our departure from English trial practice.

Since I have said so much, and may say more, in praise of English methods, let me disclaim at once any indiscriminate laudation of things English. Any notion of a general superiority of English over American law would be wide of the mark. The state of legal education in the two countries would of itself go far to answer such a suggestion. Either in the history or the

⁹ By Miss. Code of 1906, §793, for example, the judge "cannot of his own motion give any instructions whatever; those given must be in writing and at the request of the party". *Bangs v. State*, 61 Miss. 363, 365 (1883). The purpose of this act is to protect the jury "from any improper influence on the part of the court, and thereby the better to preserve the sanctity of the trial by jury"; and it is violated by "a succinct, extremely intelligible, and very accurate explanation of the principle of the criminal law applicable to the case before the jury"; *Williams v. State*, 32 Miss. 389, 397 (1856); or by correctly answering in the affirmative a question from the jury whether on an indictment for murder they had the right to convict the defendant of manslaughter. *Gilbert v. State* 78 Miss. 300 (1900). Other statutes not much better are collected in Thompson on Trials (2nd ed.), §2375.

¹⁰ Col. Code Civil Proc., §187, cl. 6.

theory of the common law, too, it would be easy to point out fields in which England has been obliged to look to American scholars. Or if it be a question of the Bench, the work of such men as Gibson and Tilghman and Sharswood—their willingness to go back to fundamental principles, and their power of illuminating generalization¹¹—may be compared with the contented superficiality with which English judges so often reason from mere cases, leaving the law in a set of separate compartments with nothing but precedent to divide them. But whatever our development on this side of the water in matters of substantive law and legal theory, we may as well frankly recognize that in administration lies our special weakness, as well as the special strength of the English. Neither national sensitiveness nor national self satisfaction should blind us to the lessons to be learned from them.

If the question were how our distorted form of jury trial came about the reasons might not be hard to find in history. Men in whose memory the trial of your great Founder was fresh needed no excuse for fearing judicial tyranny;¹² and it would have been strange, after the noble resistance of Edward Bushell and his fellow jurors,¹³ if the colonists had not looked to the jury as the protector of popular liberties. The tradition of such views would naturally persist; and generations accustomed to lay judges¹⁴ had no such inducements to restore controlling power to the judge as might have been felt with magistrates learned in the law.¹⁵ A primitive community, moreover, lacking the amuse-

¹¹ In the preface to the third edition of his treatise on Negligence, p. VIII, Mr. Beven explains the omission of American cases as due to the increasing divergence of English and American authority—a divergence arising in great part from a broader and deeper development of the subject in this country—and adds “Yet the Americans have a genius for law; and the learning and brilliancy of the judgments found in Johnson’s or Metcalf’s or indeed in any of the best American reports on the historical development of the common law is such that no English writer can afford to neglect them”.

¹² Mr. Loyd has pointed this out in his “Early Courts of Pennsylvania”, 42.

¹³ Cf. *A Sixteenth Century Jury*, 25 GREEN BAG, 296 (1913).

¹⁴ Loyd, *Early Courts of Pennsylvania*, 53, 107; Pound, *Administration of Justice in the Modern City*, 26 HARV. L. REV. 303 (1913).

¹⁵ Other reasons are pointed out by Professor Pound in his article on “Some Principles of Procedural Reform”, 4 ILL. LAW REV. 388 (1910).

ments of urban life, lacked also some of our modern inducements for abbreviating trials and suppressing the dramatic activities of counsel.¹⁶ The pioneer who turned to good account the means of entertainment afforded by the courthouse, had little reason to complain of a system which promoted new trials; else the practice, which seems so strange to us today, of allowing two jury trials in all cases as a matter of right, could not have persisted as long as it did in many places.¹⁷ Such things eventually disappeared, as did your statute¹⁸ (after remaining on the statute book for over twenty-five years) which forbade the citation of English precedents after the Declaration of Independence; but habits of thought inherited from a time when such things seemed rational may have had their influence in making it possible for eminent lawyers to entertain such a notion of jury trial as is exhibited in the *Slocum* case.

The important point, however, is not how our present evils came about, but how they may be cured. The first step in finding the cure is the diagnosis; and this is not difficult.

The great defect in our system is that it does not call on the trial judge to play his proper part either as a judge or an administrator. So far as administration is concerned it may almost be said that it shuts its eyes to the whole matter, conceiving of him only as a judicial officer, and forgetting that administration is a

¹⁶ As Professor Pound has said in *The Administration of Justice in the Modern City*, 26 *HARV. LAW REV.* 320 (1913): "The farmer, remote from the distractions of city life, found his theatre in the court house, and looked to politics and litigation for amusement."

¹⁷ In the *Federalist*, No. 83, Hamilton says that in Georgia, "an appeal of course lies from the verdict of one jury to another, which is called a special jury", and that "in the four Eastern states" "there is an appeal of course from one jury to another till there have been two verdicts out of three on one side". Judge Story refers to the same practice in *U. S. v. Wonson*, 1 Gall. 5, 14 (*U. S. C. C.* 1812). In Massachusetts this right to a second jury trial, obtained by a statutory process known as a review, continued well into the last century. *Quincy*, 558n; 6 *Dane Ab.* 453-462; *Swett v. Sullivan*, 7 *Mass.* 342 (1811). This was finally changed in 1818 (*St.* 1817-8, c. 85); but not till after broad hints from the bench. "The policy of reviews is certainly questionable. They may have been of more utility in former times than they are at present." *Burrell v. Burrell*, 10 *Mass.* 221, 222 (1813). "Reviews of right, to try a second or third time matters of fact, are impolitick as tending to introduce perjury or embracery." *Perry v. Goodwin*, 6 *Mass.* 498, 500 (1810).

¹⁸ Act of March 19, 1810, P. L. 136; Act of March 29, 1836, P. L. 224; *Loyd*, *Early Courts of Pennsylvania*, 150.

great part of his work. In his merely judicial capacity, on the other hand, upon which its attention is focussed, it makes extravagant and unreasonable demands upon him. Thus it calls on him, not only to do what he ought not to be expected to do, but also to leave undone much of a judge's real work.

The first of these defects should be met by giving the judge full powers of administration, and making him use them. His should be the responsibility for the prompt and decorous conduct of the trial, and for making the proceedings march to a conclusion. He should be, in fact as in theory, "the directing and controlling mind at the trial, and not a mere functionary to preserve order, and lend ceremonial dignity to the proceedings."¹⁹ One way in which his power should be exercised much more vigorously than is usually done is in controlling the bar, preventing controversies between opposing counsel, protecting witnesses from improper treatment, cutting short unprofitable cross-examination. The scope allowed by our ordinary practice to counsel is very excessive. In theory a lawyer has no right to open his mouth except for three purposes: to address the jury in opening and closing, to examine or cross-examine witnesses, to present objections and arguments to the court. There is no reason why he should be permitted to speak a word to opposing counsel for any purpose. If this statement sounds doctrinaire and extreme, that very fact indicates the laxity with which we have come to take for granted unnecessary and wasteful talk by counsel—talk which even when innocent and well intentioned is often provocative of a different sequel. An exact adherence to these principles is not only sound in theory, but is perfectly practicable, and their steady application produces an almost magical result. Trouble between counsel disappears for the simple reason that nothing is started which can lead to it.

In the next place, the judge should be called on for all possible help to the untrained tribunal over which he is presiding in its difficult work of passing on the facts. In long trial, perhaps involving hard questions of expert judgment, the business

¹⁹ *Whitney v. Wellesley & Boston Street Railway*, 197 Mass. 495, 502 (1908).

of weighing conflicting testimony is a serious task for men unused to analysis or to abstract ideas; and a system which gives full scope to the eloquence of lawyers and then denies the jury the assistance of the only trained and impartial mind in the court room, whatever its excuse in days of royal tyranny or lay magistrates, is today a senseless perversion. Pennsylvania belongs in theory to those more enlightened communities which retain the common law right of the judge to express an opinion on the facts—a right which fearlessly and justly exercised might do much, without any change in our system, to relieve the much discussed evils of expert testimony.²⁰ There is reason to believe, however, that the judge's exercise of his rights in Pennsylvania today falls short of what proper administration requires.²¹ The common law theory has been stated by a distinguished judge as follows:²²

“A judge does not discharge his duty who contents himself with being the mere passive recipient of evidence which he is afterwards to reproduce to the jury, without pointing out

²⁰ See Professor Sunderland's article, already mentioned, on “The Inefficiency of the American Jury”, 13 MICH. LAW REV. 302 (1915).

²¹ The recognition of this power by the Supreme Court, while distinct, is not expressed in language which tends to encourage its use. *Leibig v. Steimer*, 94 Pa. 466 (1880); *McCormick v. McCormick*, 194 Pa. 107 (1900); *Fitzpatrick v. Union Traction Co.*, 206 Pa. 335 (1903). And an outsider who reads the proceedings on the impeachment of Judge Porter in 1825 is led to conjecture that there may be things in local tradition tending toward caution in the exercise of such powers by the Pennsylvania judiciary. One ground of impeachment, presented by counsel for the managers as “a transaction in which the rights of the jury were wantonly and grossly trampled under foot”—“a gross insult to the jury” (who “knew more of men and manners and mankind from their relative situations and avocations in life than the judge, who is a mere man of books, can do”)—“a violation of his official duty by an interference with the rights, the powers, and the duties of the jury”—“an attempt to control them improperly in their verdict” which “in an individual would have been embracery, a vile and pestiferous criminal offence”, and “in the respondent” was “no less”—consisted, on the managers' own showing only in refusing to accept a verdict rendered in flat violation of the judge's instructions on a point of law, directing the jury to retire and reconsider it, reprimanding counsel who attempted in open court to incite disobedience to these instructions, and setting aside the verdict when persisted in. (Report of the Trial of Hon. Robert Porter, 6, 57-8, 72-3, 117, 151-2, 172-3, 185, 202-4, 223, 245-8, 272-4, 286.) If, as alleged by his accusers, “the judge said he would not allow the jury to kick the law out of the court house” his conduct fitted a not unworthy purpose.

²² Cockburn, C. J., charge to the jury in the *Tichborne* case, vol. 2, 814-5 (1874). Cf. the comments of Ruffin, J., in *State v. Moses*, 2 Dev. 452, 457 (N. C. 1830), on the North Carolina statute of 1796 forbidding the judge to

the weight of the facts and the inferences to which they properly and legitimately give rise. . . . It is his business to take care that inferences which properly arise from the facts shall be submitted to the consideration of the jury, with the happy consciousness that if he in aught goes wrong, there is the judgment of twelve men having experience in the everyday concerns of life to set anything right in respect of which he may have erred. But if the facts are such that, placed in the scale to which they respectively belong, the one scale kicks the beam and the other goes down, the fault is in the nature of the case and not in the conduct of the judge. . . . A jury assisted by a judge is a better tribunal for the ascertaining of facts and the establishment of truth than a judge unassisted by a jury; but . . . it is the business of the judge to assist a jury . . . by placing the whole case before them—not only bringing before them all the facts, but also pointing out the inferences which appear to arise from those facts; and without this assistance on the part of the judge, the office of the juror is liable to be imperfectly fulfilled. I have yet to learn that it is the business of the judge to suppress facts because they make against the accused; or to refrain from pointing out the conclusions to which the facts, as established by the evidence, properly lead—to suggest to the jury arguments or explanations of the unsoundness of which he is himself convinced; or to adopt those of counsel when satisfied they are delusive; or to refrain, out of tenderness to the accused, from exposing fallacies and sophistry, the hollowness of which he is able to see through, but which may have the effect of misleading minds less accustomed than his own to dissect and analyze evidence in dealing with facts, and to find the way, amid the conflict of testi-

charge on the facts: "An unfair and partial exhibition of the testimony can alone be complained of; and the apprehension of that seems to have induced the passage of the law under consideration. It is not for us to say whether that apprehension was well or ill founded; or whether the administration of the law would not be more certain, its tribunals more revered, and the suitors better satisfied, if the Judge were required to submit his view upon *the whole case*, and after the able and ingenious, but interested and partial arguments of Counsel, to follow with his own calm, discreet, sensible and impartial summary of the case, including both law and fact. Such elucidations from an upright, learned and discreet magistrate, habituated to the investigation of complicated masses of testimony, often contradictory, and often apparently so but really reconcilable, would be of infinite utility to a conscientious jury in arriving at just conclusions—not by force of the Judge's opinion, but of the reasons on which it was founded, and on which the jury would still have to pass. If this duty were imposed on the Judge, it is not to be questioned, that success would, oftener than it does, depend on the justice of the case, rather than the ability or adroitness of the advocate. But such is certainly neither the duty, nor within the competency, of our Judges."

"It is not too much to say of any period, in all English history, that it is impossible to conceive of trial by jury as existing there in a form which

mony, to the ascertaining of truth—truth and truth alone being the object to be attained. If such a principle were admitted, it would follow that the stronger and clearer the case against the accused, the more reticent must be the judge, the more deficient in his duty in placing the case before the jury in the clearest and plainest light."

On the administrative side, then, our system requires too little of the judge. On the judicial side it errs almost as conspicuously by asking too much. It demands that he rule right; and how unreasonable is the demand! Considering the number and character of the questions presented, and the lack of opportunity for study, it is unreasonable to suppose that anybody could give the right answer to all. "Perfection is not to be expected in a science that is but mildly described as inexact";²³ and even if the trial judge decide right, what will it profit him if the court which has "the last guess on the law" decide wrong and reverse him? A correct decision means, in terms of plain fact, such a decision as the upper court will hereafter deem correct; and how can any trial judge be sure of knowing that? The pertinency of this may be tested by any trial lawyer of experience if he will recall how much oftener the best *Nisi Prius* judges he has known were reversed than were some of their inferior brethren, and will then ponder the reasons for this notorious fact.

Having made this inexorable demand on the trial judge that he rule correctly on the points of law presented to him, our system demands nothing further of him. It leaves him free to take a general verdict from the jury even though he has made a series of rulings on difficult questions, and the result of reversing him on any one of these will be a new trial. Here again the system errs egregiously on the administrative side, and leads to results that are as wasteful as they are unintelligent. Something

would withhold from the jury the assistance of the court in dealing with the facts. Trial by jury, in such a form as that, is not trial by jury in any historic sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected." Thayer, *Preliminary Treatise on Evidence*, p. 188n.

See also comments of Mr. Justice Brown on such statutes in 12 Rep. American Bar Association, pp. 274-276 (1889).

²³ *People v. Strollo*, 191 N. Y. 42, 68 (1908).

more than ruling on the questions presented to him may often be the very thing the judge should do to prevent the trial from going to waste; and this further effort, which our system does *not* require, is not an impossibility in its nature, like the present demand of legal infallibility, but is something of which any lawyer fit to be a judge should be capable. He is there to conduct a trial; a proceeding for determining justly an issue of fact. The facts must be tried somehow. Of old it was done by the ordeal or by battle. Today it is not an appeal to bodily strength or divine interposition, but to human reason. For this difficult and important undertaking of sifting truth from falsehood a particular piece of machinery is provided by our system. It is a contrivance with obvious defects, easy to criticize and often criticized,—chiefly by those who are least familiar at first hand with its workings. But whatever the defects or the merits of trial by jury—and of its merits there is not a little to be said,—we must accept it and make the best of it so long as our fundamental law remains unchanged. It is undoubtedly an expensive and slow moving process; so much the more imperative the necessity to practice a good economy and avoid needless wastes in its use. And the first duty of the judge is to see that the jury do the work for which it was called together at the public expense: namely, *determining* the facts. It is his responsibility that when the jury is discharged those facts are determined once and for all. For this purpose all that is necessary is that he so study the case on trial as to understand what points of law it raises and what are the controlling issues of fact. Any good lawyer should be able to do this; it is precisely the task which is entrusted to a master or auditor whenever a case is sent to him for hearing. He is to report the facts; all the facts which the court will need; when he has done this it is unimportant whether he rules on the law or not. In some places rulings by masters are common; but they make no difference in the result. No error in law will embarrass a court thereafter or give ground for a re-committal; indeed a court may prefer to do without rulings altogether. The facts, on the other hand, in all their material aspects, concern the master in the highest degree; and if he fails to

make necessary alternative findings, and so necessitates the delay and expense of a recommittal, he fails to perform his duty with proper attention or intelligence. The analogy holds in all material points with a jury trial. It is by no means the most important thing whether the judge's rulings on the law points raised by the case be right or wrong. If wrong, they can be corrected. But it is vital that he present the case to the jury in such a form that it can decide the material facts and put before the upper court all the materials necessary for a final disposition of the case.

What needs to be done for this purpose will vary with the case. The problem may be simple, or it may not. Very often it will call for the submission of special questions to the jury;²⁴ but a good judge will never forget the importance of making such questions few and plain, and avoiding the dangers of a mistrial which long and complicated questions invite.²⁵ This problem of digesting the matter so as to present its essential features in a simple and intelligible form may call for study and careful

²⁴ As Mr. Chief Justice Sharswood said in *Patterson v. Kountz*, 63 Pa. 246, 252 (1870), this is "often a very convenient practice, and prevents embarrassing questions from arising subsequently on a motion for a new trial, or on a writ of error, when it cannot otherwise be known on what grounds the verdict was rendered. In this instance . . . the verdict took the wind out of all the plaintiffs' points and exceptions."

But as Mr. Justice Brown has pointed out (12 Am. Bar Ass. Rep., pp. 279-280 [1889]) the judge should not be *required* to put questions in all cases. In this respect the act recently approved by the Pennsylvania Bar Association (18 Pa. Bar Ass. Rep., p. 270 [1912]) seems open to criticism. This point was much discussed in the Massachusetts Bar Association in 1913, and the Association decided that it could not recommend stronger language than that which was finally adopted: "When any such question of law shall arise in a trial the judge shall by leaving appropriate questions to the jury . . . ascertain so far as practicable all the facts both as to liability and damages necessary on any theory of the law to enable the court to make a proper final disposition of the case unless in the opinion of the court such a course is inexpedient under the circumstances of the case." Mass. Statutes, 1913, c. 716, s. 2. No doubt a weak judge may evade such a statute as this by discovering that questions are "inexpedient"; but an absolute requirement forces an unjustifiable waste of time in some cases. Suppose, for example, the judge plainly sees that there is nothing in the plaintiff's case, and that he should be nonsuited without calling on the defendant. If the facts must be specially found the defendant will be practically forced to put in his evidence, to nobody's advantage.

It is to be remembered that a statute requiring special interrogatories to the jury, and providing that the answers shall prevail over the general verdict, does not contravene the Seventh Amendment. *Walker v. So. Pac. Ry.*, 165 U. S. 593 (1897).

²⁵ "The practice of permitting a large number to be put is almost sure and is usually intended to produce answers inconsistent with the general

thought by the judge; but his function is one which assumes the capacity and the disposition to think. With the help of counsel, to which he is always entitled, there is no reason why he should not be able to frame questions, disposing of the controversy in any aspect of the law, which can be answered by the jury without confusion or embarrassment.

The importance of obtaining from the jury the necessary material for a final decision has always been understood by English courts. They have never tolerated the wasteful and unintelligent practice to which we tamely submit of taking a general verdict and letting the case go up on exceptions;²⁶ on the contrary it has been their regular practice, as a reference to the English reports for a hundred years before the Judicature Act will show, to take a verdict from the jury with leave to enter a different verdict thereafter if the law required it.²⁷ This simple and flexible method, which can be made to fit all sorts of situations, gave the judge time to consider the law after the verdict without delaying the trial, and left the matter in such shape that any error could be corrected by the appellate court. It did this, too, without trenching in the least on the jury's powers. Even those whose sensitiveness concerning judicial encroachment makes them object to the judge's charging on the facts cannot reasonably criticize *this* feature of the English practice. It exalts, not limits, the jury's function, for it provides that their labors shall not be in vain, but shall settle the case according to the law.

The Pennsylvania statute which was before the court in the *Slocum* case aims at the same just results as the English practice, and in a measure accomplishes them. It covers only a part of the ground, because it can be invoked only by a party who is entitled to have judgment entered in his favor as a matter of law

verdict." Mr. Justice Brown in 12 Am. Bar. Assn. Rep., p. 280 (1889). For the evils of such a practice see also "Special Interrogatories to Juries", W. W. Thornton, 20 AM. LAW REV., pp. 366, 381-2 (1886); Thayer's Preliminary Treatise on Evidence, p. 218n. When the interrogatories numbered "nearly two hundred" it is not surprising that the jury resorted to "a special verdict by way of answers". *Cleveland Ry. Co. v. Scantland*, 151 Ind. 488, 490 (1898).

²⁶ Thayer, Preliminary Treatise on Evidence, 239-240, 529.

²⁷ See Lord Blackburn's exposition of this practice and its history in *Dublin etc. Ry. Co. v. Slattery*, 3 App. Cas. 1155, 1204-5 (1878).

on all the evidence,²⁸ and so does not extend to the other situations in which the same method may usefully be applied,²⁹ often with the aid of some special findings of fact. Still it meets many situations and may fairly be classed with those "practical reforms for facilitating business without impairing settled legal principles" in which, as a great judge has said, "Pennsylvania has always been in the front."³⁰ If, as might at first sight appear from the decision in the *Slocum* case, the result at which the statute aims has now become impossible in the Federal Courts, this is much to be regretted. A new trial then becomes a matter of right even when the issue has once been fully tried, and the plaintiff has been proved to have no case. The suit should confessedly have ended then and there, and it would have done so but for the error of the trial judge. The matter being a mere question of law it is not apparent in reason why a higher court should have less power than a lower one. And the result is worse than waste because of the sharp temptation which the new trial offers the prevailing party to make his evidence meet the demands of the law as now laid down. Any lawyer familiar with trials knows how real is this danger, and how prone are juries to disregard the sinister meaning of the change. In Pennsylvania and Massachusetts, therefore, whose courts see no violation of the constitutional right of trial by jury in the statute condemned in the *Slocum* case, that decision came as a blow. It seemed to mean that the desirable powers conferred by the statute were denied to the Federal Courts until the Constitution of the United States should be amended. But upon further examination the point on which the decision turns reduces itself to a matter of mere form which may be met by adopting the common English practice before the Judicature Act. This was a reservation of leave to enter a different verdict if the law required it. As this leave was reserved at the trial, and by the consent of the jury, the verdict finally entered

²⁸ The careful opinions in *Wilde v. Trainer*, 59 Pa. 439 (1869); *Casey v. Paving Co.*, 198 Pa. 348 (1901), and *Dalmas v. Kemble*, 215 Pa. 410 (1906), make plain the scope and effect of the Act of 1905 and its predecessors, and clear up some confusion in the earlier decisions.

²⁹ See note 32 below.

³⁰ *Dalmas v. Kemble*, 215 Pa. 410, 412 (1906).

pursuant to the leave *was the jury's verdict*.³¹ Thus the only difficulty which the majority of the court found insuperable—the lack of a verdict of the jury—is met.

It is important therefore, that States in the present predicament of Pennsylvania and Massachusetts should add to their existing statutes a provision giving the court the power to deal with the matter after the English fashion. By the terms of the Conformity Act it would be the duty of the Federal Court to follow the State practice; and the verdict once entered, would be safe from attack on constitutional grounds.³²

The attentive exercise by a trial judge of his full administrative powers ought to go far to eliminate the evil of new trials.

³¹ So in *Mead v. Robinson*, Barnes's Notes (3rd ed.) 451 (1744), where the reservation provided for a nonsuit, if the opinion of the court should be with the defendant, "The Court declared the Form of the Rule to be wrong; it ought to be, If the Opinion be for Defendant, that the Verdict be entered for him *ex Assensu Juratorum*. This Method of reserving Points of Law came in lieu of a Special Verdict, and ought to make a final Determination on each Side in all Cases, except Ejectment, where the Party may begin again at his Pleasure."

³² I am indebted to my learned friend John L. Thorndike of the Boston Bar for this suggestion. In order to adapt it to the Massachusetts practice, Mr. Thorndike has prepared the following bill and memorandum: "*When exceptions to any ruling or direction of a judge shall be alleged, or any question of law shall be reserved, in the course of a trial by jury, and the circumstances shall be such that, if the ruling or direction at the trial was wrong, the verdict or finding ought to have been entered for a different party or for larger or smaller damages or otherwise than as was done at the trial, the judge may reserve leave with the assent of the jury so to enter the verdict or finding, if upon the question or questions of law so raised the court shall decide that it ought to have been so entered. The leave reserved, as well as the findings of the jury upon any particular questions of fact that may have been submitted to them, shall be entered in the record of the proceedings, and, if upon the question or questions of law it shall be decided either by the same court or the appellate court that the verdict or finding ought to have been entered in accordance with the leave reserved, it shall be entered accordingly and, when so entered, shall have the same effect as if it had been entered at the trial.*" [This bill has been passed by the Massachusetts Legislature, and is now Mass. St. 1915, c. 185. It has already been applied in the Federal Court; *Freeman v. Stebbins*, U. S. Dist. Ct., Dist. of Mass., April 20, 1915.]

"In order to enable the jury to give their verdict according to the law as it ought to have been laid down at the trial, the practice arose in England early in the eighteenth century, for the judge at the trial to reserve leave to enter the verdict according to the direction which it might afterwards be decided that he ought to have given at the trial: Lord Blackburn in *Dublin & Wexford Ry. Co. v. Slaterry*, 3 App. Cas., pp. 1204-1205 (1878). This was done with the assent of the jury, *Mead v. Robinson*, Barnes, 451 (1744); *Treacher v. Hinton*, 4 B. & Ald. 413, 416 (1821), and the verdict ultimately entered was thus in fact the verdict of the jury just as if the proper direction had been given at the trial and the verdict actually entered then. Bothwell's

It should bring about a situation where the mere fact of a new trial means discredit to some of the ministers of justice concerned in the first trial—judge, jury, or counsel. That is what it ought to mean; but it is far from our present system, under which new trials are continually granted for errors which may be nobody's fault. Does it necessarily reflect on a trial judge when an appellate court reverses him on a question of law by a majority of one?

Case, 215 Mass., p. 476 (1913). This was found a convenient means of correcting the mistakes of the judge at the trial and of obtaining the verdict of the jury in accordance with the rulings that he ought to have made.

"Thus, in an action for negligence, a verdict was given for the plaintiff, with leave to enter it for the defendant according to the opinion of the court on the question of law whether the defendant was responsible for the acts of the workmen who were negligent. *Taylor v. Greenhalgh*, L. R. 9 Q. B. 487 (1874).

"So, in an action against the acceptor of a bill of exchange payable at a banker's, the plaintiff was nonsuited, with leave to enter a verdict for him, if the court decided that notice to the defendant of non-payment was unnecessary. *Treacher v. Hinton*, 4 B. & Ald. 413 (1821).

"In an action for breach of contract, a verdict was given for £28 (composed of £8 and £20 for specified damage), beyond £2 paid into court, with leave to reduce the verdict by the £8 and £20, or either, if the court should be of opinion that the plaintiff was not entitled to both or either. *Hobbs v. London & South-Western Ry. Co.*, L. R. 10 Q. B. 111, 113 (1875); see also *Dittmar v. Norman*, 118 Mass., pp. 323, 324 (1875).

"It was necessary that the leave so to enter the verdict should be reserved at the trial, in order that the verdict might be that of the jury (see *Treacher v. Hinton*, 4 B. & Ald., p. 417 [1821]), for the court could enter only such a verdict as the jury assented to.

"According to this bill, where leave is reserved at the trial, the proper verdict may be entered either by the appellate court upon a bill of exceptions or report, or by the judge that tried the case upon motion, and in the latter case the decision of the judge would be subject to revision upon a bill of exceptions or report. By this means a judge can reserve questions of law at the trial for further consideration, which he cannot do under the existing law, as shown by *Smith v. Lincoln*, 198 Mass. 388, 391 (1908). The English judges often do this, *e. g.*: *Watkins v. Naval Colliery Co.*, [1911] 2 K. B., pp. 163, 167; *West Yorkshire Agency v. Coleridge*, *id.* 326; *Smith v. Martin*, *id.* 775, 777.

"By these provisions also the practice in the State courts and in the federal courts in the district would be assimilated. In the latter, according to the decision of a majority in *Slocum v. New York Life Ins. Co.*, 228 U. S., pp. 375, 399 (1913), when a verdict for one party is set aside on the ground that there was no evidence to support it, judgment cannot be entered for the other party without a verdict of the jury for that party, although such a verdict ought to have been directed by the judge without allowing the jury to consider the evidence. By reserving leave at the trial so to enter the verdict upon decision of the question of law, the verdict of the jury is given and entered in accordance with their assent given at the trial. *Bothwell's Case*, 215 Mass., p. 476 (1913). By the U. S. Rev. Sts., s. 914, the practice in the federal courts conforms to that of the State courts. *Glenn v.*

This desirable elimination of new trials can only be approximated so long as our law of evidence remains in its present form. An error in ruling on evidence may often create a difficulty which can be met by no leave reserved or special question, but only by a new trial. But this is largely due to our "exaltation of the ordinary rules of evidence, which are mere instruments of investigation, into an end in themselves,"³³ and should be met by a more rational and modern treatment of the law of evidence. Our law goes beyond all bounds in giving litigants rights in mere procedure, and this even though the very rule which it thus makes a matter of private property, was made not for the benefit of the

Sumner, 132 U. S. 152, 156 (1889); *Central Transportation Co. v. Pullman Co.*, 139 U. S., pp. 38-40 (1891)."

Mr. Thorndike has also drawn up the following forms to illustrate the working of the statute:

"The jury find for the plaintiff and assess damages in the sum of eight hundred and eighteen dollars, seventy-two cents.

"A. B., Foreman.

"*Question*—In case the jury find for the plaintiff, what additional damages should be given for the dualin manufactured before the abandonment of the contract, if the plaintiff is entitled to recover for such dualin?

"*Answer*—Three hundred and fifty dollars." See *Dittmar v. Norman*, 118 Mass. 319, 323 (1875).

"When the jury announce their verdict in court, the judge will say to them that a question of law has been reserved for consideration by the court, and that leave will be reserved with the assent of the jury to enter the verdict for three hundred and fifty dollars in addition to the damages found by them, if upon the question of law reserved the court shall decide that the verdict ought to have been so entered. The jury will assent, and a note of the leave so reserved will then be made at the foot or on the back of the verdict or on the docket, and the verdict entered subject thereto, as follows:

"Leave being reserved with the assent of the jury to enter the verdict for three hundred and fifty dollars in addition to the eight hundred and eighteen dollars and seventy-two cents damages found by them, if upon the question of law reserved the court shall decide that the verdict ought to have been so entered."

"Leave to reduce the damages would be similarly reserved, as in *Hobbs v. London & Southwestern Ry. Co.*, L. R. 10 Q. B. 111, 113 (1875)."

"In a case like *Negus v. Simpson*, 99 Mass. 388, 391-392 (1868), the damages would be ascertained according to the contentions of both parties, and leave reserved to enter the verdict according to the proper rule, which would have saved the second trial."

"So, a verdict being directed for the defendant, leave could be reserved to enter the verdict for the plaintiff for the amount of a draft, upon the decision of a question of law, as in *Treacher v. Hinton*, 4 B. & Ald. 413 (1821). So, if the jury find for the plaintiff in a case like *Slocum's Case*, 228 U. S. 364 (1913), the verdict would be entered for the plaintiff with leave reserved to enter the verdict for the defendant if the court should decide that the judge ought to have directed such a verdict."

³³ Wigmore on Evidence, §21.

litigant who invokes it, but to serve the general good by expediting and simplifying trials,³⁴ or even to protect the interests of a third person.³⁵ How rational would our treatment of such matters look to a sane observer free from inherited prejudices? On this point we may well take warning from the impressions which our methods make on every intelligent layman. "None but a lawyer or one whose mind was biased by the learning of the law", to use Lord Cowper's phrase,³⁶ could view them with satisfaction.³⁷ As was said by one whose studies in Jurisprudence, combined with experience in practice, gave him the perspective necessary to see the matter at its proper focus:³⁸

"No unprejudiced observer can be blind to the excessive credit and importance attached in judicial procedure to the *minutiae* of the law of evidence. This is one of the last refuges

³⁴ The exclusion of evidence, for example, because it involves collateral issues which outweigh its value—such as accidents to others or contradictions of a witness on immaterial matters.

³⁵ In this extreme case some courts have taken the rational view that the erroneous admission of the evidence gave other litigants no ground of exception. *People v. Kinglake*, 11 Cox C. C. 499 (1870); but this is by no means the universal doctrine. *Westover v. Aetna Life Ins. Co.*, 99 N. Y. 56 (1885); *Com. v. Kimball*, 24 Pick. 366, 369 (Mass. 1837); *State v. Olin*, 23 Wis. 309, 318 (1868).

³⁶ *Brown v. Barkham*, Prec. Ch. 461 (Eng. 1716).

³⁷ Extravagant laudation of the rules of evidence, as if they were the product of supernatural wisdom, is to be found all through the books. These are specimens:

"All questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty, and our property, are all concerned in the support of these rules, which have been matured by the wisdom of ages." Lord Kenyon in *King v. Eriswell*, 3 T. R. 707, 721 (Eng. 1790).

"One of the most learned writers upon the spirit of the laws of England has said that uncertainty in the law of high treason would prevent any state from being free. This was the opinion of our ancestors, who, in Edward the Third's time, crushed, by one statute, all the subtleties and uncertainties that had been introduced into our laws. The relaxing the rules of evidence is more dangerous in the administration of justice, than all the constructive treasons that ever were invented." Best, C. J., in *Strother v. Barr*, 5 Bing. 136, 154 (Eng. 1828).

"Generally I quite agree that I should desire to know the historical evidence about Spitalfields, which for every purpose, except that of deciding the issue as to property between private persons, nobody would think of excluding; but I yield to authority on the law of evidence without reluctance, because I am satisfied that in the main the English rules of evidence are just, and I am satisfied also that there is no portion of the English law which ought more rigidly to be upheld." Hamilton, L. J., in *Attorney-General v. Horner*, 2 Ch. 140, 156 (1913).

See also "Observations on the Law of Evidence", 13 MICHIGAN LAW REV. 355 (1915).

of legal formalism. Nowhere is the contrast more striking between the law's confidence in itself and its distrust of the judicial intelligence. The fault is to be remedied not by the abolition of all rules for the measurement of evidential value, but by their reduction from the position of rigid and peremptory to that of flexible and conditional rules. Most of them have their source in good sense and practical experience, and they are profitable for the guidance of individual discretion, though mischievous as substitutes for it."

This statement is the more striking as it comes from a British source. Just as are Mr. Salmond's criticisms on the law of his own country, we carry the methods which he condemns so much farther that compared with ours their flexible and rational handling of the law of evidence might seem the very thing that he advocates.³⁹ The English barrister is bewildered when he observes our incessant wrangling over evidence; and no wonder, for we have transcended all bounds of reason.

If the law of evidence were treated as Mr. Salmond proposes a double gain would result. Insistence on unimportant points of evidence, and the waste of time spent in discussing them, would be much reduced, for there would no longer be any profit in it. It is a mischief due first and foremost to the temptation offered by our system to each side—especially the side that scents defeat—to make as large a collection of exceptions as it can, hoping that something may be found among them to take the fancy of an appellate tribunal. The present trial would thus be helped; and there would be no less a gain in preventing new trials. This is the true way to remove the stumbling block which the law of evidence puts in the way of statutes aimed at preventing reversals for causes not going to the merits. If the aggrieved party had a *right* to the admission or exclusion of the evidence, it is hard to meet his argument that no one can tell what the jury would have done if the ruling had been the other way. The answer should be that except for some rules which vest a privilege in him, the violation of a rule of evidence is not a matter of private right at all. It is only when the violation is of an important and fundamental

³⁹ Salmond, *Jurisprudence* (4th ed.) 452.

⁴⁰ Mr. Leaming's observations on this point are interesting: "A Philadelphia Lawyer in the London Courts," 102-4. See also Wigmore on Evidence, §21.

sort, or palpably calculated to do him serious harm⁴⁰—the sort of thing sometimes indicated by the phrase “abuse of discretion”—that he should be allowed to complain. We may look forward confidently to a time when this view will be accepted; when, as Professor Wigmore prophesies:⁴¹

“Just as English legislators, after yielding to the twenty years’ pleading of Romilly, discovered after all that the enjoyment of the right of property in chattels could survive, without the fancied protection of the penalty of death for larceny,—so we shall some day awake to be convinced that a system of necessary rules of evidence can exist and be obeyed, without affixing indiscriminately to every contravention of them the monstrous penalty of a new trial.”

The problems of appellate procedure are chiefly of this sort—of determining the extent to which litigants should be accorded rights in matters of procedure, and obtaining from the jury in all cases the necessary material for a final decision on appeal. Once this material has been obtained the difficulties about putting it in proper shape for an appellate tribunal are relatively small. There are indeed States still afflicted by practices more than six hundred years old concerning exceptions. In England for centuries means have been found of avoiding such troubles; the task of preparing a bill of exceptions from the notes of Mr. Justice Stareleigh is not the sort of thing that English courts would be likely to spend their time on. Today the official stenographer provides an escape from such inconveniences, even where exceptions are retained; and Pennsylvania is among the communities enlightened enough to take advantage of this relief. Fortunately for your bar, it is thus in no position to realize what is involved in the process of reducing exceptions to “narrative form”; for no one who has not made this attempt with an aggressive and demanding adversary can appreciate its full exasperations. When, however, as in this State, natural evolution

⁴⁰ Cf. the test laid down by the Judicial Committee of the Privy Council for granting leave to appeal in criminal cases; whether “by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.” *In re Dillet*, 12 App. Cas. 459, 467 (1887); *Ibrahim v. Rex*, A. C. 599, 614-5 (1914).

⁴¹ Wigmore on Evidence, §21.

has given the appellate tribunal its material at first hand and in official form, and not in a paraphrase, the accuracy of which depends on how far opposing counsel have succeeded in neutralizing one another's attempts to inject color into the narrative, the only serious problem is that of proper condensation. That may be a matter to which your bar ought to give more attention, and thereby render needed aid in the administration of justice. Burdening the parties with the expense of printing, and the court with the labor of searching, swollen "machine made cases" full of unnecessary matter is a serious evil for which no good excuse can be offered;⁴² but it may easily be cured if counsel will only study the record with proper pains and cut out unnecessary matter. Often all the testimony which is really needed lies in the narrowest compass. If counsel are lax in their duty in this regard, the trial judge has ample means of enforcing it, and can do so with little difficulty if he is awake to his responsibilities. If, as may well be feared, trial judges fail to give due attention to this matter, it is only one more instance of the habit of focussing attention on the *judicial* side of their work to the neglect of their administrative function.

⁴² "If by any protest on our part the profession could be induced to abandon the machine-made cases which, under the present system, have taken the place of the methodical and carefully prepared cases and bills of exception of former days, the court would plead earnestly for such a reform, as it would be a great relief to every court of review, and aid in the dispatch of business and in an intelligent administration of justice. Stenographers have taken the place of the attorneys whose duty it is to prepare, and of the counsel whose duty it is to peruse and examine, and of the judge who should settle cases and exceptions for the purposes of review. The rough, ill-digested and defective, and frequently unintelligible transcripts and translations of the stenographer's minutes of the trial, without correction or explanation, are stitched together and labeled a case, or exceptions, as may suit the fancy, and the labor is thrown upon the court to wade through a mass of stuff and dig out the kernel of facts or the point of an exception which may be buried beneath it. Some parts of the case before us are entirely unintelligible; and the exceptions taken in the course of the trial are so interjected, that it is not easy to place or apply them. It is very likely that parties may sometimes suffer by this process, which while it saves the labor of the profession, very greatly adds to that of the court, and not unfrequently embarrasses it in arriving at a certain and definite understanding of the merits. A rule of the Supreme Court might correct this evil to a great extent. The practice of printing the evidence by question and answer, in most cases, only benefits the printer. There are but few cases in which, for any purpose, this method of setting forth the evidence is necessary or proper." Allen, J., in *Howland v. Woodruff*, 60 N. Y. 73, 77 (1875).

This weakness of our trial methods in administration is constantly to be observed. One instance may be found in the practice of hearing medical expert testimony, often at great length, in suits for personal injuries which are presently taken from the jury, perhaps without even calling on the defendant, because there is no evidence of liability. Such a waste of time and money is unpardonable when it could so easily be avoided by hearing the evidence on liability first and finding whether there is a case for the jury before going into the question of damages. It is satisfactory to observe that your court has lately had the wisdom to correct this practice,⁴³ still so common elsewhere; but a like disregard of promptness and economy in mere matters of judicial housekeeping may be seen on every side. Such things ought not to continue. Administration is no doubt the weak spot in a democracy; and crying defects must remain until expert treatment of disease is seen to be as necessary for the body politic as for the individual. There are encouraging signs, however, that such an understanding is on the increase; and slowly as public opinion moves in such matters, it has momentum when aroused. Once it be aroused, the American "genius for law" ought not to be permanently inferior to that of our English relatives when, as here, it is a question of inventiveness, practical efficiency, and speed. One sign that a solution of the difficulties is approaching will be the passing of the "cult of incompetence",⁴⁴ and the recognition that efficient administration depends first and last on men; that in your Founder's historic words:

"Governments, like clocks, go from the motion men give them; and as governments are made and moved by men, so by them they are ruined, too. Wherefore governments rather depend upon men, than men upon governments."

Ezra Ripley Thayer.

Harvard Law School.

⁴³ Rule 135 of March 3, 1913.

⁴⁴ See Lowell, *Public Opinion and Popular Government*, chapters 17, 18; Faguet, *The Cult of Incompetence*.